Filed 7/24/19 Callahan & Blaine v. Vogeler CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALLAHAN & BLAINE, Plaintiff and Respondent, v. WILLIAM K. VOGELER, Defendant and Appellant.	G055912 (Super. Ct. No. 30-2016-00883371) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Affirmed.

William K. Vogeler, in pro. per., for Defendant and Appellant.

Callahan & Blaine, Edward Susolik and Raphael Cung for Plaintiff and Respondent.

* * *

Attorney-defendant William K. Vogeler, in propria persona, appeals a grant of a motion for summary judgment (MSJ) in favor of law firm-plaintiff Callahan & Blaine (Callahan) based upon the breach of a written contract promising the payment of past legal service fees arising from Callahan's prior representation of a common client. Vogeler argues procedural error requires reversal based upon insufficient notice of the MSJ. Regarding the merits of the MSJ, Vogeler argues the trial court's grant was improper because, among other things, Callahan's underlying attorney lien was invalid and the resulting written contract was otherwise not supported by sufficient consideration. We find no abuse of discretion and no error by the trial court in granting the MSJ. The judgment is affirmed.

I

FACTS AND PROCEDURAL HISTORY

A. Written contracts for payment of attorney fees

In 2005, Pyramid Technologies, Inc. (Pyramid), experienced a water intrusion incident on its business premises. In 2006, Pyramid and Callahan entered into a retainer agreement wherein Callahan would represent Pyramid "with respect to general representation and litigation, including dispute with ADC [a matter not related to this case] and related representation." (Boldfacing and underlining omitted.) In 2008, Callahan filed a lawsuit on behalf of Pyramid against its insurer, Hartford Casualty Insurance Company (Hartford), for insurance benefits claimed in connection with the water incident (the Hartford Action).

In 2009, Callahan ceased representing Pyramid in the Hartford Action due to a conflict of interest. In July 2011, Pyramid and its president and owner Tony Mavusi entered into a "Debt Acknowledgment and Tolling Agreement" (boldfacing and underlining omitted) with Callahan wherein Pyramid (and Mavusi as a guarantor) affirmed that Pyramid owed Callahan $114,212.08 for outstanding legal fees and costs

incurred for various matters, including the Hartford Action, and would pay the balance. With the signing of the Debt Acknowledgment, Callahan filed in the Hartford Action and served on Hartford's counsel a "Notice of Attorneys' Lien" claiming a lien on any judgment or payment for the affirmed sum.

Pyramid eventually became represented by Vogeler, who is an attorney of codefendant law firm Gruenbeck & Vogeler (G&V). During Vogeler's representation, Pyramid agreed to a settlement of the Hartford Action for a payment of $1,525,000 by Hartford to Pyramid (settlement proceeds). In connection with this settlement, Pyramid and Callahan entered into two agreements regarding releases of claims and payment of monies: "the Mutual Release Agreement" and "the Lien Release Agreement." The Mutual Release recognized Callahan's notice of lien and stipulated that, in exchange for the parties' mutual releases of one another — including Callahan's release of its lien rights — Hartford would issue a check for $1,525,000 payable to Vogeler's client trust account.

The Lien Release included G&V as a contracting party and collectively identified it, Pyramid, and Mavusi as "Obligors" to Callahan. The Lien Release specifically stated, among other things, that "[t]o induce [Callahan] to enter into the Mutual Release [Agreement], the parties now enter this [Lien Release] Agreement," and that "[i]n consideration for [Callahan's] agreement to enter the Mutual Release, and to induce [Callahan] to execute the Mutual Release, the Obligors agree that within ten (10) days after G&V receives the $1,525,000 check payable to William K. Vogeler Attorney-Client Trust Account . . . , Obligors shall pay C&B the sum of $82,500. . . . " The Lien Release and Mutual Release were signed on the same day in July 2015 – Vogeler signed on behalf of G&V.

Consistent with the agreements, Hartford paid the settlement proceeds to Vogeler's client trust account, from which Vogeler was paid an attorney fee of $125,000. However, despite Callahan's numerous requests to Vogeler for payment of its $82,500

pursuant to the Lien Release, Vogeler refused to make the payment. Accordingly, Callahan filed a lawsuit against Vogeler and G&V, comprised of three causes of action: (1) breach of a written contract (the Lien Release); (2) money had and received; and (3) promissory estoppel. Vogeler and G&V filed a joint answer and cross-complaint.[1] In the lawsuit, Callahan filed an application for a writ of attachment against Vogeler and G&V which the trial court denied, finding it unlikely Callahan could establish that the Lien Release was supported by sufficient consideration.

B. Callahan's MSJ

On June 30, 2017, Callahan filed and personally served on Vogeler its MSJ. The initial MSJ hearing date was reserved and noticed for October 19, 2017, which was three days *after* the trial date of October 16, 2017. Then, on July 12, 2017, Callahan filed an ex parte application to advance the hearing date. Over Defendants' opposition, the application was granted and the hearing was advanced to September 28, 2017, with the trial date remaining the same (Hearing Advancement Order). On August 1, 2017, Callahan served notice of the Hearing Advancement Order by mail.

Vogeler filed an opposition brief with his declaration in support but did not file any objections to the evidence offered by Callahan. Nowhere in Vogeler's papers did he claim he was prejudiced by the scheduling or notice of the MSJ, which was heard on the advanced date and granted in favor of Callahan. Specifically, finding no triable issue of material fact existed, the trial court found Vogeler and G&V jointly and severally liable for $82,500 owed to Callahan based upon its breach of contract and common count allegations.[2] Vogeler timely appealed the resulting judgment.

---

[1] Vogeler filed the cross-complaint as an attorney of G&V, for indemnification against Muvasi and another party which was dismissed before being served and is not material to the disposition of this appeal.

[2] The trial court did not rule on Callahan's third cause of action for promissory estoppel.

II

DISCUSSION

A. Calendaring of the MSJ hearing

Vogeler contends the court committed reversible procedural error by issuing the Hearing Advancement Order. Specifically, Vogeler argues there was no good cause to advance the MSJ hearing date nor to set it for a date less than 30 days before trial. Vogeler argues the Hearing Advancement Order violated his right to the minimum amount of statutory notice. The record is clear that: the Hearing Advancement Order was issued 78 days before the MSJ hearing was held; Callahan served (by mail) formal notice of the Hearing Advancement Order almost three weeks after it was issued, which was 58 days before the hearing was held; and, prior to the Hearing Advancement Order, Vogeler was initially served with the MSJ papers 90 days before the hearing was held. Finally, the record is also clear that nothing in Vogeler's opposition papers at the trial court nor his appellate brief have addressed what prejudice, if any, Vogeler suffered because of the procedural path of the MSJ.

An MSJ hearing should be held no less than 30 days before trial unless the trial court orders otherwise, based upon a finding of good cause. (Code Civ. Proc., § 437c, subd. (a)(2).)[3] Additionally, a party moving for summary judgment must provide a minimum of 75 days' notice (§ 437c, subd. (a)(2)) and a court does not have discretion to allow less, absent a stipulation by the opposing party. (*Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 764.)

Issues of hearing rescheduling for good cause and statutory notice are reviewed for an abuse of discretion. (See *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 763-765 [good cause for continuance of MSJ hearing date]; *Urshan v. Musicians' Credit Union*, *supra*, 120 Cal.App.4th at p. 763 [minimum notice

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

of MSJ hearing].) An abuse of discretion is shown where, under the circumstances, ""“no reasonable basis for the action is shown."”" (*Denton v. City & County of San Francisco* (2017) 16 Cal.App.5th 779, 791-792.) Further, a court's procedural error will be reversed only where it "has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Meaning unless prejudice resulting from the error is evident upon the face of the record, a "miscarriage of justice" requires an appellant to demonstrate prejudice. (*Santina v. General Petroleum Corp.* (1940) 41 Cal.App.2d 74, 75-78.)

We find no error in the trial court's issuance of its Hearing Advancement Order. The record, which shows an earlier initial hearing date for Callahan's MSJ was not available due to the court's calendar, supports the court's express finding of good cause and our conclusion that a reasonable basis for the advancement of the MSJ hearing date existed. Additionally, the timing of the order was not error because it was issued more than 75 days before the MSJ hearing was held. To illustrate, if Callahan had personally served its MSJ papers on the day the order was issued, there would have been no question of statutory compliance because good cause had been found to hold the hearing less than 30 days before trial (§ 437c, subd. (a)(2)) and Vogeler would have received notice of the hearing more than 75 days ahead of time. (§ 437c, subd. (a)(2).)

Without analysis, Vogeler cites three cases in support of his assertion of error. None of them persuade us reversible error must be found in this case. Both *Urshan v. Musicians' Credit Union*, *supra*, 120 Cal.App.4th 758 and *McMahon v. Superior Court* (2003) 106 Cal.App.4th 113, are inapposite because they were based solely upon trial court orders that set initial notice periods shorter than the statutory minimum. (*Urshan v. Musicians' Credit Union*, *supra*, 120 Cal.App.4th at pp. 762-763 [10-day notice period created by court order when the MSJ statute required 28 days]; *McMahon v. Superior Court*, *supra*, 106 Cal.App.4th at p. 114 [21-day notice period created by court order when the MSJ statute required 28 days].) In contrast, as mentioned above, the notice period indirectly created by the timing of the Hearing

Advancement Order was 78 days, in excess of the minimum notice required by section 437c, subdivision (a)(2).

Robinson v. Woods (2008) 168 Cal.App.4th 1258 (*Robinson*), also does not compel a finding of reversible error in this case. In *Robinson*, the moving parties gave insufficient notice by serving their MSJ papers on the opposing parties by mail 76 days before its initial hearing date (instead of the 80 days required where service is effected by mail), to be held 18 days before trial. (*Id*. at pp. 1259-1260.) The opposing parties solely objected on procedural timing grounds and did not address the merits of the MSJ in any way. (*Ibid*.) In contrast, the timing of the Hearing Advancement Order provided Vogeler more than the statutory minimum time to prepare his opposition after a finding of good cause.[4] We find this case most similar to *Carlton v. Quint* (2000) 77 Cal.App.4th 690. In *Carlton*, the court stated that an opposing party can waive a claimed error based upon an issue of defective service of notice, by arguing the merits of an MSJ at its hearing. (*Id.* at pp. 696-698.) Notably, *Carlton* incorporated a prejudice inquiry in its analysis (*id.* at p. 697), which does not conflict with *Robinson* because the *Robinson* court expressly found the opposing parties in that case "did not have to claim or show prejudice because they did not address the merits [of the MSJ], in writing or otherwise." (*Robinson*, at p. 1267.) In contrast, Vogeler's opposition in this case did address the merits of Callahan's MSJ, as the moving party did in *Carlton*. (*Carlton*, at p. 697.) In sum, neither the operative facts nor reasoning in *Robinson* compels a finding of reversible error in this case.

Vogeler has not demonstrated prejudice and, although deciding not to file a reply brief is not, in and of itself, an admission, we take Vogeler's election to not file a

[4] The *Robinson* court also concluded the opposing parties' due process rights had been violated. (*Robinson*, *supra*, 168 Cal.App.4th at p. 1268.) Given that Vogeler has not asserted a due process violation argument, we do not address this aspect of *Robinson* in this case.

reply under these circumstances, as a concession of Callahan's counterargument that he cannot. (See *Johnson v. English* (1931) 113 Cal.App. 676, 677 ["[a]ppellant, by failing to file a reply brief, concedes that respondent's position is unassailable"].) Based upon the above, we find neither the face of the record nor Vogeler has demonstrated how he was prejudiced by the procedural path of Callahan's MSJ. As a result, we find Vogeler has not carried his burden to demonstrate reversible procedural error.

B. Standard of review and relevant law for MSJ's merits

"A summary judgment is to be upheld if all the evidentiary papers submitted—which we review independently—show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. We do not resolve factual issues but ascertain whether there are any to resolve."[5] (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 25.) A grant of MSJ may be affirmed "'on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court.'" (*California School of Culinary Arts v. Lujan*, *supra*, 112 Cal.App.4th at pp.21-22.) However, theories not raised in the trial court are forfeited for appellate review. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

[5] Vogeler challenges the form of the judgment entered by asserting the grant of the MSJ failed to make determinations of disputed facts. At the trial court level, Vogeler filed an objection complaining the proposed grant order was not a statement of decision. Vogeler is mistaken in his understanding that he was entitled to a statement of decision containing findings of facts. (See *Soto v. State of California* (1997) 56 Cal.App.4th 196, 199 [contrasting a statement of decision pursuant to § 632 following a court trial versus a statement of reason pursuant to § 437c, subd. (g) following a grant of MSJ].) We find that the 14-page order granting the MSJ satisfied the requirements of section 437c, subdivision (g), by stating the trial court's reasons for the grant. Moreover, given that we review a grant of an MSJ for the correctness of the result and not necessarily its reasoning (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 21-22), Vogeler's challenge has no ground for reversal.

The moving party bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the moving party carries this initial burden, it shifts to the opposing party who must make a prima facie showing that a triable issue of material fact exists. (*Ibid.*) The moving party at all times bears the burden of persuasion that there is no triable issue of material fact and it is entitled to judgment as a matter of law. (*Ibid.*) The moving party's papers are strictly construed and the opposing party's papers are liberally construed, with all doubts as to the propriety of granting summary judgment resolved in favor of denying it. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.)

Under the undisputed facts of this matter, Callahan was entitled to judgment as a matter of law on its breach of contract cause of action.[6] "The standard elements of a claim for breach of contract are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom.'" (*Wall St. Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.) As discussed below, the Lien Release was an enforceable contract. Callahan performed its obligation by signing the Mutual Release. G&V breached its promise through the nonperformance of Vogeler. As a result, Callahan suffered damages in the amount of the promised $82,500.

C. The Lien Release was enforceable

A breach of contract action requires the existence of an enforceable contract. Specifically, a plaintiff must prove the parties agreed to exchange something of value (Civ. Code, § 1550), that the contract terms were clear enough that the parties could understand what each was required to do (*Weddington Productions, Inc. v. Flick* (1998)

[6] The records indicates Vogeler did not file any objections to Callahan's proffered MSJ evidence.

60 Cal.App.4th 793, 811-812), and the parties agreed to the terms. (Civ. Code, § 1580.) We find the written terms of the Lien Release were clear enough that the parties understood what each was required to do and that Callahan and G&V agreed to the terms. Next, we also find the parties agreed to exchange something of value: Callahan's lien.

1. Callahan's underlying lien was valid

Generally, an attorney's lien for past services and costs is created by contract (Civ. Code, § 2881) and can create a security interest in a litigation's future proceeds which will attach to the lien giver's interest once acquired. (*Novak v. Fay* (2015) 236 Cal.App.4th 329, 336; see Civ. Code, § 2883, subd. (a).) Further, it is well established that if notice of a prior attorney's lien is received but subsequently ignored at the time of payment to the client, both the paying insurer and its counsel can be held liable for intentional interference with a prospective economic advantage. (*Levin v. Gulf Ins. Group* (1999) 69 Cal.App.4th 1282, 1287-1288.) In this case, the retainer agreement specified the creation of a lien interest in favor of Callahan: "[Pyramid] grants [Callahan] a lien for the payment of fees, costs and any other sums due or which may become due and owing by [Pyramid] to [Callahan] on [Pyramid's] right to recover, and any actual recovery of any sums in the above-referenced matter, whether or not [Callahan] continues to represent [Pyramid] therein."

Accordingly, Pyramid gave Callahan a lien interest in the former's interest in the Hartford Action, which would have attached to the settlement proceeds absent an agreement stating otherwise. Further, given that Callahan had provided notice of its lien to Hartford through its counsel, if the latter had ignored the lien and simply paid Pyramid and Vogeler the settlement proceeds, Callahan would have had a cause of action against Hartford (and its counsel) for payment of its lien. (*Levin v. Gulf Ins. Group*, *supra*, 69 Cal.App.4th at pp. 1287-1288.) Under these circumstances, when Callahan signed the Mutual Release containing a release of its claims related to the Hartford Action, it released

its right to attach its lien interest in the settlement proceeds and its right to potential recourse against Hartford (and its counsel).

In opposition, Vogeler argues the Lien Release should be found unenforceable because Callahan's underlying lien was invalid on two grounds. First, Vogeler asserts the underlying retainer agreement between Callahan and Pyramid was invalid because it did not reference the Hartford Action but instead only referenced an unrelated matter regarding a "dispute with ADC." In response, Callahan points out the retainer agreement's scope of representation expressly includes reference to "general representation and litigation," which Callahan contends included the Harford Action. (Boldfacing and underlining omitted.) Vogeler has chosen to not reply to Callahan's counterpoint and, further, did not provide any citation to legal authority to support his contention. Accordingly, we find that Vogeler has waived this assertion (see *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523 [an appellate brief must contain reasoned argument and, if possible, legal authority to support its contentions or the court may treat the claim as waived and not address the argument on its merits]), as well as conceded to Callahan's counterpoint. (*Johnson v. English*, *supra*, 113 Cal.App. at p. 677.)

Second, Vogeler argues the Lien Release should have been found unenforceable because it was partially comprised of fees incurred by Pyramid for legal services unrelated to the Hartford Action. Stemming from this argument, Vogeler also asserts that Callahan's invoice for its work in the Hartford Action only amounted to $29,585.95 (the Hartford Invoice), creating a triable issue of material fact as to whether the Lien Release's agreed upon payment of $82,500 for incurred fees was valid. Again, Vogeler does not cite any legal authority in support of his contention that unrelated work could not support Callahan's lien, so we find his argument waived. (*McComber v. Wells*, *supra*, 72 Cal.App.4th at pp. 522-523.) Further, even if we considered its merits, Vogeler's argument would fail because, as a general principle, an attorney's lien asserted in an action need not be limited only to fees or costs related to that action.

(*Bluxome Street Associates v. Fireman's Fund Ins. Co.* (1988) 206 Cal.App.3d 1149.)[7] Based upon this same principle, the fact that the Hartford Invoice amounted to less than half of the agreed upon Lien Release payment (i.e., $29,585.95 of $82,500), by itself, did not constitute a triable issue of material fact. There was no dispute that other unrelated fees charged by Callahan to Pyramid, combined with the Hartford Invoice, totaled more than the $82,500 legal fees that were agreed upon in the Lien Release. In sum, Vogeler has not met his burden to demonstrate that Callahan's lien was invalid or that a triable issue of material fact existed on this issue.

2. The Lien Release was supported by adequate consideration

A contract must be based upon consideration. (Civ. Code, § 1550.) Consideration can be comprised of: (1) a benefit agreed to be conferred which the promisor does not already have a right to receive (Civ. Code, § 1605); (2) a prejudice agreed to be suffered which the promisee does not already have a legally duty to bear (Civ. Code, § 1605); or (3) mutual promises made between parties. (*Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.* (1958) 160 Cal.App.2d 290, 295.)

The Lien Release was supported by sufficient consideration by at least two forms of prejudice suffered by Callahan. First, as discussed above, by signing the Mutual Release, Callahan gave up its legal right to enforce its security interest on the settlement proceeds of the Hartford Action. (See discussion, ante, at pt. II.C.1.) Second, Callahan

---

[7] In *Bluxome Street Associates*, the First District Court of Appeal reviewed a dispute between competing lienholders claiming priority to a client-debtor's settlement proceeds. Among other issues, the appellants in *Bluxome Street Associates* specifically challenged the trial court's determination that a law firm that had provided legal services unrelated to the case that had produced the settlement proceeds, had priority over the appellants. (*Bluxome Street Associates v. Fireman's Fund Ins. Co.*, *supra*, 206 Cal.App.3d at pp. 1151-1152.) The appellate court rejected appellants' argument and affirmed the trial court's determination, finding the lien was not rendered unenforceable because it secured payment for unrelated legal services. (*Id.* at pp. 1152-1154.)

chose to accept a discounted payment of $82,500 and not its previously acknowledged lien of $114,212.08.

In opposition, Vogeler argues there was insufficient consideration because prior to the MSJ, the trial court had denied Callahan's application for a writ of attachment based upon a finding that Callahan was "not likely to establish that there was good consideration for defendant [G&V's] obligation under the [Lien Release]." Vogeler's citation to the writ denial is without merit because the prior denial did not compel the same finding for the MSJ. Indeed, such a result is expressly disclaimed by statute. (§ 484.100 ["The court's determinations under this chapter shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter . . ."]; see *North Hollywood Marble Co. v. Superior Court* (1984) 157 Cal. App.3d 683, 691 [statutory language and editors' note suggest the primary intent of § 484.100 is to preclude initial determinations regarding attachment from being adopted in determining issue in the principal action].)

In other words, the trial court's determination in the MSJ was not bound in any way by its prior ruling on Callahan's application for a writ of attachment, so the latter cannot serve as a ground for finding error in the grant of the MSJ. Instead, the record simply reflects that the trial court, upon analyzing the question of sufficient consideration a second time, concluded, correctly, that sufficient consideration did support the Lien Release.

Next, Vogeler cites to *Steiner v. Thexton* (2010) 48 Cal.4th 411, to argue the Lien Release was not supported by sufficient consideration because it did not result in prejudice suffered by Callahan. *Steiner* involved a written agreement entered into between a landowner and a land developer wherein the owner would hold open his offer to sell land to the developer for three years with the developer retaining a right to cancel the transaction at his sole discretion during the same time period. (*Id.* at p. 419.) The *Steiner* court stated its holding did not apply to bilateral contracts (*id.* at p. 419, fn. 8) and

held that the developer's partial performance on what the court deemed was an option agreement had constituted both a benefit to the owner and prejudice suffered by the developer. That was sufficient to cure what otherwise may have been an illusory promise by the developer. (*Id.* at p. 422.)

Accordingly, the holding in *Steiner v. Thexton*, *supra*, 48 Cal.4th 411, does not support Vogeler's position in this case because the Lien Release was a bilateral contract. Moreover, even if it did apply, the reasoning in *Steiner* demonstrates that sufficient consideration existed in this case. That is, Callahan's execution of the Mutual Release constituted contract performance that resulted in prejudice suffered by Callahan in the form of releasing its lien against the settlement proceeds of the Hartford Action (see discussion, ante, at pt. II.C.1) and accepting less than the entire acknowledged lien amount. For all of the reasons discussed above, Vogeler has failed to rebut Callahan's demonstration that the Lien Release was based upon sufficient consideration.

D. Callahan's Performance

Next, "[i]t is well settled that the breach of an important condition may excuse the other party from performance. (Civ. Code, § 1439.) 'A party complaining of the breach of a contract is not entitled to recover therefor unless he has fulfilled his obligations.'" (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 12.) In this case, Callahan performed as it had promised in the Lien Release, by signing the Mutual Release and releasing its security interest in the settlement proceeds of the Hartford Action. (See discussion, ante, at pt. II.C.1.)

For the first time on appeal, Vogeler asserts that Callahan's signing of the Mutual Release amounted to its release of the causes of action asserted against Vogeler and G&V in this case. Generally, theories not raised in the trial court are forfeited for appellate review. (*Nellie Gail Ranch Owners Assn. v. McMullin*, *supra*, 4 Cal.App.5th at p. 997.) Vogeler cites no legal authority in support of his position and has not filed a

reply to Callahan's counterarguments, which include a contention that because Vogeler's new assertion was not raised at the trial court level, it should not be considered on appeal. Under these circumstances, we find Vogeler has waived the issue (*McComber v. Wells*, *supra*, 72 Cal.App.4th at pp. 522-523), and conceded to Callahan's counterargument. (*Johnson v. English*, *supra*, 113 Cal.App. at p. 677.) We decline to consider the assertion. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) However, even if we did consider the merits of the assertion, the undisputed facts demonstrate no triable issue of material fact exists regarding whether the parties intended for Callahan to release its lien rights without payment. In other words, reading the undisputed terms of the Lien Release and Mutual Release together shows an unambiguous intent by Callahan and G&V to resolve Callahan's lien claim in the Hartford Action with a payment of $82,500 to Callahan. Vogeler has failed to rebut Callahan's demonstration that the latter performed as required by the Lien Release.

E. Breach by Vogeler

A plaintiff asserting a breach of contract must prove that the defendants breached the contract at issue. (*Wall St. Network, Ltd. v. New York Times Co.*, *supra*, 164 Cal. App. 4th at p. 1178.) Among other ways, a contract may be breached by "an unjustified failure to perform a material contractual obligation when performance is due," also known as "nonperformance." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514, fn. 3.) In this case, Callahan contends that, at all relevant times, Vogeler was acting as an agent for G&V. In opposition, Vogeler disputes he was an agent of G&V but does so by representing that G&V was his fictitious business name and that he was acting as a sole practitioner at all relevant times. For the purposes of analyzing whether there was error in the grant of MSJ only, we construe Vogeler's representation as meaning that he and G&V were at all relevant times one and the same

entity.[8] (*Ball v. Steadfast-BLK* (2011) 196 Cal.App.4th 694, 701 ["'Use of a fictitious business name does not create a separate legal entity' distinct from the person operating the business"].) Accordingly, G&V's undisputed nonpayment of $82,500 was also Vogeler's nonpayment and he has failed to demonstrate that his nonperformance was somehow justified.

F. Causation of damages

Finally, as previously mentioned, "[a]n essential element of a claim for breach of contract are damages *resulting from the breach*." (*St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1060.) It is well established that "[t]he detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." (Civ. Code, § 3302; see *Coughlin v. Blair* (1953) 41 Cal.2d 587, 603 [breach of contract damages are awarded to give the injured party the benefit of his bargain and place him as close as possible to "the same position he would have been in had the promisor performed the contract"].) Vogeler unjustifiably breached the Lien Release and if he had performed as promised, Callahan would have received a payment of $82,500 in 2015. Accordingly, Callahan demonstrated that it incurred damages in that amount, supporting the grant of its MSJ.

In opposition, Vogeler asserts Callahan did not incur any damages because the Lien Release stated Callahan's release of its lien was contingent upon receiving payment of $82,500, so the fact that Callahan did not receive the payment means the lien was never surrendered and Callahan remains in the same position as he was prior to

[8] In asserting that G&V was his fictitious business name, Vogeler argues the trial court's judgment of joint and several liability against him and G&V was error. Again, Vogeler does not cite to any legal authority to support his argument. Accordingly, Vogeler has waived this issue. (Cal. Rules of Court, rule 8.204(a)(1)(B); *McComber v. Wells*, *supra*, 72 Cal.App.4th at pp. 522-523.)

entering the Lien Release. In this false argument, Vogeler is apparently trying to be clever in asserting that because he didn't pay as promised, Callahan was not damaged. Again, Vogeler provides no citation to legal authority to support his assertion. Nor has he filed any reply to Callahan's response that it was indeed damaged in the amount of $82,500 because it never received payment of that promised amount. Under these circumstances, we find Vogeler has waived his contention (*McComber v. Wells*, *supra*, 72 Cal.App.4th at pp. 522-523) and conceded to Callahan's counterpoint. (*Johnson v. English*, *supra*, 113 Cal.App. at p. 677.) Even if we considered its merits, Vogeler's argument would clearly fail because Callahan changed its position through the Lien Release when it signed the Mutual Release and gave up its legal right to enforce its security interest on the settlement proceeds of the Hartford Action. (See discussion, ante, at pt. II.C.1.) Contrary to Vogeler's assertion, there was no triable issue of material fact as to whether Callahan changed its position through the Lien Release.

III

DISPOSITION

The judgment is affirmed. Callahan is entitled to its costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.